IN THE

Supreme Court of the United States

October Term, 1971
No. 71-123

Supreme Court, U.S.
FILED
SEP
E. ROBERT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW,
Counsel for Respondent.

Of Counsel:
O'MELVENY & MYERS,
611 West Sixth Street,
Los Angeles, Calif. 90017.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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NATIONAL LABOR RELATIONS BOARD,

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THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent is the Petitioner in *Burns International Security Services, Inc. v. NLRB*, Docket No. 71-198 (filed on August 9, 1971),* wherein it seeks a writ of certiorari to review a portion of the Judgment of the United States Court of Appeals for the Second Circuit which is not covered by the instant petition.

Opinions Below.

The opinion of the court of appeals** is not yet reported. The decision and order of the National Labor Relations Board (herein the "Board") are reported at 182 NLRB No. 50.***

*After the court of appeals had rendered its decision, Respondent changed its name to "Burns International Security Services, Inc." from "The William J. Burns International Detective Agency, Inc."

**Petition pp. 15-23. "Petition 15-23" refers to pages 15-23 of the Petition for Certiorari. Similar designations will be used herein.

***Petition pp. 25-37.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Does the refusal of a sub-contractor, which is held to be a successor, to adopt, honor and enforce a collective bargaining agreement between the previous sub-contractor and the union representing the previous sub-contractor's employees constitute an unfair labor practice under the provisions of Sections 8(a)(5) and 8(d) of the Act, where there have been no dealings between the two sub-contractors, and the successor sub-contractor has not consented to be bound by said agreement and was not a party to the negotiation thereof either by an agent or an alter ego?

Statutes Involved.

The relevant provisions of the Labor Management Relations Act, 1947, as amended (herein the "Act"), 29 U.S.C. 151, *et seq.* (1964), are set forth in the Petition.*

Additional Statement.

Petitioner's statement (Petition p. 2, *et seq.*) is generally accurate but requires some amplification.

At different periods of time, plant protection services at a facility of Lockheed Aircraft Service Company (herein the "Facility") were rendered by The Wackenhut Corporation and Respondent. (See Petition pp. 2-3.) Lockheed was a prime Government contractor. Employees of Wackenhut and Respondent needed top-secret security clearances at the Facility because of Lockheed's Government contracts.

*Petition pp. 58-60.

Wackenhut's performance at the Facility had been part of its operations in California, which consisted of between 200 and 300 plant protection contracts. Respondent did not take over Wackenhut's other contracts. There were no dealings between Respondent and Wackenhut. All business dealings were between Respondent and Lockheed, or Wackenhut and Lockheed. Respondent did not acquire Wackenhut's assets, records, books, supplies or uniforms. Respondent's performance at the Facility was integrated into the operation of its existing nationwide organization. The work at the Facility was part of Respondent's Pacific Division, Los Angeles Branch and Ontario Sub-Office. The Ontario Sub-Office administered 30 contracts in addition to the Facility contract.

Respondent's operation within the Ontario Sub-office area* was highly centralized and integrated. Uniform policies and practices existed with respect to labor relations, personnel matters, employment and training of guards. Except for a single job supervisor, Respondent's guards at the Facility had common supervision with guards performing at Respondent's other jobs in the Ontario Sub-Office area. It was Respondent's practice to interchange guards, both temporarily and permanently, on a daily basis. Such interchange had a direct impact on the Facility work force. Initially, Respondent employed 42 guards at the Facility, 27 of whom were former Wackenhut guards, and 15 of whom were Respondent's guards who had been transferred thereto from Respondent's

*As used herein the term "Ontario Sub-Office area" shall refer to the area supervised through the Ontario Sub-Office excluding Los Angeles County. Respondent's guards in Los Angeles County were represented by the American Federation of Guards.

other jobs. Within six months after Respondent replaced Wackenhut, former Wackenhut guards constituted less than a majority of the guards at the Facility, as a result of the transfer of guards from Respondent's other jobs and new hires.

In the instant case, the Board, for the first time, held that a sub-contractor, found to be a successor, was bound by the agreement between the previous sub-contractor and the union representing the previous sub-contractor's employees. Previously, the Board had held that a successor was not bound by its predecessor's collective bargaining agreement unless it expressly assumed said agreement. *Rohlik, Inc.*, 145 NLRB 1236, 1242 n. 15 (1964). In changing its prior holdings, the Board relied upon this Courts' decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). However, even though the Board's decision was rendered after this Court's decision in *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), said decision was not mentioned by the Board.

The court of appeals, in an opinion by Circuit Judge Paul R. Hays, relied upon *H. K. Porter* and refused to enforce that portion of the Board's order requiring Respondent to adopt, honor and enforce the agreement between Wackenhut and International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 (herein the "Wackenhut agreement"), holding that, "Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement." (Petition p. 21.)

REASONS FOR DENYING THE WRIT.

1. The court of appeals correctly denied enforcement of the portion of the Board's order requiring Respondent to adopt, honor and enforce the Wackenhut agreement.

The Board's decision that Respondent must adopt, honor and enforce the Wackenhut agreement is in violation of Section 8(d) of the Act. In addition, as the court of appeals stated:

> "The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc. v. National Labor Relations Board*, 397 U.S. 99 (1970). . . ." (Petition p. 21.)*

Section 8(d), which provides that the statutory duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession," was added to the Act in 1947.**

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*Cases upholding the Board's power to order an employer to execute an agreement negotiated on his behalf by an agent, an *alter ego*, or a multi-employer association in the absence of a timely withdrawal, are inapposite. See *NLRB v. Strong*, 393 U.S. 357 (1969); *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *Oilfield Maintenance Co.*, 142 NLRB 1384 (1963). In these cases, the employer consented to be bound to the agreement, and all that remained was the formal execution. It has never been contended that Wackenhut was Respondent's *alter ego* or agent.

**At that time, Congress rejected a proposed addition to the Act which would have made it an unfair labor practice for an employer:

> "[T]o violate the terms of a collective-bargaining agreement. . . ."

S. 1126, As Reported, 1 Legislative History of the Labor Management Relations Act 99, 111 (herein the "Legis. Hist. LMRA"), and in the House version as passed by the Senate, H.R. 3020, As Passed Senate, 1 Legis. Hist. LMRA 226, 239.

In *H. K. Porter,* this Court reviewed the history of the Act and stated:

> "The object of . . . [the Act] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:
>
> > 'The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' " (397 U.S. at 103-04.)

This Court, specifically referring to Section 8(d), further stated:

> "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." (*Id.* at 103.)

In *H. K. Porter*, the Board had held the employer had violated Section 8(a)(5) of the Act by adamantly refusing to agree to a dues checkoff provision, intending thereby to frustrate the consummation of a collective bargaining agreement. The Board ordered the employer to agree to said provision. This Court, while agreeing that the employer had not bargained in good faith, held that because of Section 8(d) and the legislative history of the Act:

> "[W]hile the Board does have the power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." (*Id.* at 102.)*

Since the Board lacks the power to order agreement to, or compliance with, a specific provision of a collective bargaining agreement, and since the Board lacks

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*Even before *H. K. Porter*, this Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) noted:

> "[T]hat the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

Accord, *Teamsters, Local 357 v. NLRB*, 365 U.S. 667, 676-77 (1961); *Steelworkers v. NLRB*, 390 F.2d 846, 853 (D.C. Cir.), *cert. denied*, 391 U.S. 904 (1968); *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *Siskin Steel and Supply Co.*, 160 NLRB 1038, 1040 (1966); *Hyde's Super Market*, 145 NLRB 1252, 1253 (1964); *United Telephone Co. of the West*, 112 NLRB 779, 782 (1955).

the power to order the making or dropping of a specific proposal, it follows that the Board lacks the power to order agreement to or compliance with an entire collective bargaining agreement.

The Board incorrectly relied upon this Court's decision in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), as authority to overcome Section 8(d), the legislative history of the Act, the cases cited above, and its own prior decisions.* *Wiley* was an action under Section 301 of the Act to compel arbitration. The question before this Court, relevant hereto was:

> ". . . [W]hether a corporate employer must *arbitrate* with a union under a bargaining agreement between the union and another corporation which has merged with the employer. . . ." (376 U.S. at 544.)** (Emphasis added.)

In *Wiley,* this Court's limited holding on said question was that under Section 301, a successor employer must arbitrate grievances under its predecessor's collective bargaining agreement. Such holding did not concern the portions of the Act related to unfair labor practices which are determinative herein. Indeed, all relevant cases cited by this Court in *Wiley* with respect to the issue of successor's duty to arbitrate arose under Section 301.

Wiley is one of the cases evolving from this Court's decision in *Textile Workers v. Lincoln Mills, Inc.,* 353 U.S. 448 (1957), where it was held that the agreement to arbitrate contained in a collective bargaining agree-

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*See *Rohlik, Inc.*, 145 NLRB 1236, 1242 n. 15 (1964).

**The other question before the Court concerned procedural arbitrability.

ment was specifically enforceable in federal courts. Since *Lincoln Mills*, this Court has underscored the importance of arbitration as a means of resolving industrial disputes.* These cases hold that under Section 301 disputes must be submitted to arbitration whenever there is any reasonable basis for so doing. In *Wiley*, this Court held that the relationship between a successor and predecessor was a sufficient nexus for referring a case to arbitration. However, the Court specifically refrained from holding that a successor is bound by its predecessor's collective bargaining agreement even though urged to do so.**

The court of appeals below, in rejecting the Board's contention that *Wiley* supported its holding herein, correctly noted the distinctions between an action under Section 301 to compel arbitration such as *Wiley*, and an unfair labor practice proceeding. The court of appeals stated:

> ". . . [T]he policy behind the decision in *Wiley* was founded upon the Court's recognition of 'the central role of arbitration in effectuating national labor policy.' . . . The Court's determination is only that 'the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.' . . ." (footnote omitted) (Petition pp. 22-23.)

**United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

***Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae at 8-22, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

The Board failed to recognize that when a court is functioning under Section 301, there are no statutory limitations on its power such as those contained in Section 8(d). However, in an unfair labor practice case, Section 8(d) and the legislative history of the Act are express limitations on the power of courts and the Board to order a non-consenting party to adopt, honor and enforce a collective bargaining agreement.

The interaction of Section 301 and other portions of the Act was considered by this Court in *NLRB v. Strong*, 393 U.S. 357 (1969). In *Strong*, the employer, who was contesting a Board order that required him to pay fringe benefits under a collective bargaining agreement, argued that the same proscriptions on courts under Section 301 applied to the Board; and therefore, an arbitrator—and not the Board—should determine what fringe benefits were due under the agreement. However, the Court held that in view of the Board's express powers under Sections 10(a) and (c) of the Act, the Board, unlike a court, was not required to defer to arbitration and could order the payment of fringe benefits. Similarly, as the court of appeals noted, in the instant case, Section 8(d) precluded the Board's expansion of the principles under Section 301 which were expressed in *Wiley*. Therefore, as the employer in *Strong* could not rely on cases decided under Section 301, the Board in the instant case cannot rely on *Wiley* to justify its holding that Respondent's refusal to adopt, honor and enforce the Wackenhut agreement was an unfair labor practice.

The stated purpose of the Board's decision herein is to promote industrial peace. However, the Board has completely ignored the policy of the Act which

encourages parties to negotiate and reach agreements which are mutually acceptable. The court of appeals found that the Board's rule of forced contracts is undesirable. It stated:

> ". . . [T]he rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider 'unusual circumstances,' (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing 'unusual circumstances,' refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties." (Petition p. 23.)

Contrary to Petitioner's contention (Petition p. 10), the court of appeals decision on the contract issue is not in conflict with *United States Gypsum Co. v. United Steel Workers*, 384 F.2d 38 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968); *United Steelworkers v. Reliance Universal, Inc.*, 335 F. 2d 891 (3rd Cir. 1964); and *Wackenhut Corp. v. United Plant Guard Workers*, 332 F. 2d 954 (9th Cir. 1964). As with *Wiley*, all of the foregoing decisions were rendered under Section 301, in actions brought to compel arbitration. The courts of appeals did not in those cases consider Section 8(d) and the legislative history of the Act referred to herein.

While the court of appeals in *Ranch-Way, Inc. v. NLRB*, ... F.2d .... (10th Cir. 1971) (Petition pp. 61-64) held that a successor is bound by its predecessor's collective bargaining agreement, the court in its decision did not mention Section 8(d), the legislative history of the Act or the decisions of this Court in *Wiley* and *H. K. Porter*. Further, even though the decision in *Ranch-Way* was rendered after the court of appeals decision below, said decision was not mentioned in *Ranch-Way*.

It is submitted that the court of appeals decision in the instant case on the issue of contract survival is correct. Accordingly, this Court should deny the writ.

2. The question presented herein is not ripe for consideration by this Court.

Respondent in its petition* has argued that the Board's order should not be enforced because of the Board's failure to articulate reasons for holding that a unit of Respondent's guards at the Facility was appropriate. Respondent urged that based on *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), this case should be remanded to the Board. Respondent has also argued that even if the Facility unit was appropriate, Respondent was not Wackenhut's successor. The validity of the Board's order that Respondent adopt, honor and enforce the Wackenhut agreement is in issue only if the Board's bargaining unit and successorship determinations are proper. Therefore, the question presented herein will not be reached if this Court acts favorably on the questions presented in Respondent's petition.

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*See petition in *Burns International Security Services, Inc. v. NLRB*, Docket No. 71-198, filed August 9, 1971.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW,
Counsel for Respondent.

Of Counsel:
O'MELVENY & MYERS,

Dated: September 8, 1971.